85-490

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,

Petitioners,

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?

II.

Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?

LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONERS

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JAMES WILLIAM AYRES,
MAURICE PAUL BELLANGER,
WILMER BEN BENSION,
LESTER JOSEPH BOUDREAUX,
A. BROOKS,
W. CAIN,
SANTO F. CULOTTA,
C. CURRY,
BERNARD E CYRUS,
BENNIE JOSEPH D'ARCANGELO,
JOSEPH ANTHONEY D'ARCANGELO,
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C. DESPORTE,
EUGENE JAMES DES ROCHES,
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EDWARD LACOSTE,
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ANDREW BRYAN NORTON,
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FERDINAND JOHN SCHWAB,
JOSEPH GEORGE SCHWARTZ,
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WILLIAM J. STOWELL,
ALFED TSCHIRN,
EMILE J. WOLF,
CHARLES LOYOLA WOLSCH,
CHARLES ZERINQUE, JR.,
L.H. ZIRKENBACK

RESPONDENTS

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BERNARD FRISCHHERTZ, JR.,
NEW ORLEANS ELECTRICAL PENSION
AND RETIREMENT PLAN,
BERNARD RAYNAL,
RICHARD E. SCHRIEFFER, SR.,
ANTHONY R. ZIEGLER

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v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered March 8, 1985.

OPINION BELOW

There is no district court opinion in this case. While the order of dismissal was entered on February 2, 1984, the district court orally rendered an opinion on February 1,

1984 which included conclusions of law. A copy of the Judgment of Dismissal and of the transcribed opinion are attached and are marked respectively as Appendix A and Appendix B.

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1985 and is reported at 754 F.2d 628 (5th Cir. 1985) and is attached as Appendix C.

The Petition for Rehearing and the Suggestion for En Banc Consideration were denied on April 22, 1985. A copy of the Order is attached as Appendix D.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1985; the Petition for Rehearing and the Suggestion for En Banc Consideration were denied on April 22, 1985. The Petition for a Writ of Certiorari was originally due on July 22, 1985. On July 19, 1985 the Petitioners obtained an order extending the time in which to file a Petition of Writ of Certiorari to and including August 20, 1985. On August 15, 1985 a second order was entered extending time in which to file a Petition for Writ of Certiorari to and including September 19, 1985.

Jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1) (1970).

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*STATUTES INVOLVED

29 USC Section 1002(1) (1970)

29 USC Section 1132 (1970)

STATEMENT OF THE CASE

This case presents a fundamental question concerning the ability of federal courts to accept jurisdiction of claims created by the Employee Retirement Income Security Act.

There are 49 named Petitioners in this action. Each Petitioner is a retired member of the New Orleans Electrical Pension and Retirement Plan. At various times prior to January 1, 1981 each of the Petitioners reached full retirement age and each chose to accept a lump-sum retirement benefit. According to the Trust document in effect at the times each Petitioner retired, a retiree received one dollar per month for each year of service performed prior to 1961 (past service credit), up to twenty years.

On July 29, 1981 the Respondents amended the Pension and Retirement Plan causing large increases in the value of a participant's past service credit. The July, 1981 amendment provided that, instead of receiving one dollar a month for each year of past service credit, a retiree would receive eight dollars per month for each year of past service credit.

Though the Respondents amended the Pension Plan in July, 1981, they made the decision to allow certain lump-

*Statutes involved are reproduced in Appendix E.

sum retirees to take advantage of the eight-fold increase in benefits. The Defendants made their July, 1981 amendment retroactive to January 1, 1981. Thus, the amendment was made to apply to lump-sum retirees who had retired seven months prior to the increase in benefits but not to apply to those who had retired seven months and one day prior to the increase in benefits. *See* Appendix F.

As soon as the lead Petitioner, Melbourne E. Joseph, Sr., learned of the increase in benefits, he applied for the additional retirement benefits but his application was rejected. The trust regulations state that "If . . . the claimant is dissatisfied with the Board's determination, he shall so notify the Board and the Board and the applicant . . . shall make a joint application . . . for . . . an impartial arbitrator . . . ." New Orleans Electrical Pension and Retirement Plan, May 1, 1974. The Trustees agreed to submit the Petitioner's claim to arbitration. *See* Appendix G. Though the parties had gone so far as to retain an arbitrator, the Respondents subsequently refused to submit to arbitration.

On or about May 11, 1983 the Petitioners filed a civil action in the United States District Court for the Eastern District of Louisiana invoking jurisdiction under the Employee Retirement Income Security Act, 29 U.S.C. Section 1132 (1970). On or about December 2, 1983 the Respondents filed a Motion to Dismiss alleging that the Petitioners lacked standing to sue since they had received lump-sum retirement benefits from the Pension Plan and therefore were not "participants."

The Petitioners opposed the Motion to Dismiss asserting that for purposes of invoking federal jurisdiction the Petitioners were indeed "participants" in that breach-

es of duty were alleged to have occurred prior to the Petitioners' retiring. The Petitioners further asserted that the Respondents admitted that the Petitioners are "participants" when the Respondents (1) allowed other lump-sum retirees to take advantage of the increase in benefits and (2) when the Respondents agreed to arbitrate the Petitioners' claim. The Petitioners also asserted that whether or not they had received all the benefits due them and whether or not they were entitled to further benefits were questions of fact to be determined by a trial on the merits.

The United States District Court for the Eastern District of Louisiana dismissed the Petitioners' complaint in its entirety concluding that "the statute clearly is not designed to cover prior lump-sum beneficiaries . . . ." *See* Appendix B.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's decision concluding that despite the language of ERISA, "[t]o be a 'participant,' a person must have either a present or a future right to benefits under the Pension or Retirement Plan" and that the Petitioners did not meet this requirement. *Joseph, et al v. New Orleans Electrical Pension and Retirement Plan,* 754 F.2d at 630.

While finding that the Petitioners lack standing under ERISA, the Fifth Circuit stated that the Petitioners might have had standing if the Complaint had been worded differently. *Id.* at 631.

On April 22, 1985 the Petition for Panel Rehearing and the Suggestion for En Banc Consideration were denied.

———o———

REASONS FOR GRANTING THE WRIT

I.

Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?

Whether individuals who accept a lump-sum retirement from an ERISA covered Pension Plan have standing to assert violations of ERISA which affect their Pension benefits and reflect a breach of duty by the Trustees is a question which has not been settled but should be settled by this Court. Furthermore, the decision of the United States Court of Appeals for the Fifth Circuit in this cause is in conflict with decisions of other United States Courts of Appeal and with the Employee Retirement Income Security Act itself.

Title 29, U.S.C. Section 1132(a) (1) (1970) states that a civil action may be brought by a participant or beneficiary . . . ." Title 29, U.S.C. Section 1002(7) (1970) states that "The term 'participant' means any employee or former employee . . . , who is or may become eligible to receive a benefit of any type from an employee benefit plan."

The Fifth Circuit has determined in *Joseph, et. al. v. New Orleans Electrical Pension and Retirement Plan, et. al.* that regardless of the claim made, regardless of the facts alleged, a lump-sum retiree of an ERISA covered plan may never invoke federal jurisdiction by way of ERISA. The Fifth Circuit concluded that lump-sum retirees have "accepted the payment of everything due them

in a lump-sum" and that they have, per se, "received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph,* 754 F.2d at 630. The Fifth Circuit ruled that "[t]o be a 'participant,' a person must have either a present or a future right to benefits under the Pension or Retirement Plan." *Id.* The Fifth Circuit did not reckon with the language of ERISA which states that a participant is one who "may become eligible to receive a benefit of any type . . . ." 29 U.S.C. Section 1002(7) (1970).

In 1981 the Fifth Circuit stated a position quite different from that stated in the case *sub judice.* In *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.,* 637 F.2d 357 (5th Cir. 1981), the Fifth Circuit was asked to determine whether or not employees who were terminated prior to the creation of the employee benefit plan were entitled to benefits. While holding that the Petitioners were not entitled to benefits, the Fifth Circuit found in favor of standing: "[A]t the time of this request their status was far from clear, and *we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement.*" *Id.* at 362. (Emphasis added.)

One year prior to the *Paris* decision, the Fifth Circuit rendered another decision, which was completely ignored in *Paris,* concerning the standing requirements of ERISA. In *Nugent v. Jesuite High School of New Orleans,* 625 F.2d 1285 (5th Cir. 1980), a former employee whose pension benefits had not vested at the time she was terminated attempted to enforce certain provisions of ERISA. The Fifth Circuit posed the sole issue as "whether a former employee whose pension benefits were not vested at the

time of her termination retains 'participant' rights under the Act." *Id.* at 1286. In holding that she does not have standing, the Fifth Circuit stated that vested former employees and nonvested current employees have standing.

The United States Court of Appeals for the Ninth Circuit has addressed the standing question several times with varying results.

The facts of *Bricklayers' Health and Welfare Trust Fund v. Brick Masons' Health and Welfare Trust Fund,* 656 F.2d 1387 (9th Cir. 1981) are generally as follows: In 1960, the Brick Masons' Fund was established by four local unions. In 1970, the plan was amended to require that any group "who ceased to be a party to this Agreement shall forfeit any and all rights and interests in the Fund." *Id.* at 1389. In 1979, the plan split into the Bricklayers' and the Brick Masons' Funds. The Bricklayers Fund attempted to negotiate recovery of what it considered to be its pro-rata share of the original plan funds. Based on the forfeiture provision quoted above, the negotiations failed. The Bricklayers filed suit alleging jurisdiction under ERISA.

The Ninth Circuit held that *"former participants are entitled to sue under Section 1132 . . . ." Id.* at 1390. (Emphasis added.) In referring to ERISA's definition of a "participant," the Ninth Circuit determined that a "participant" for jurisdictional purposes is quite different than that for other ERISA purposes. Because the "former participants allege that they are entitled to receive certain benefits from the Brick Masons' Fund [,] they are therefore participants for jurisdictional purposes." *Id.* at 1391.

Subsequent to the *Bricklayers'* case, the Ninth Circuit rendered another opinion without any reference to *Bricklayers'*. In *Freemen v. Jacques Orthopedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983) the plaintiff sought damages on the theory that he was misled as to the cost of participating in the plan and that his waiver of his right to participate in the plan was induced by the defendant's misrepresentation. The Ninth Circuit held that *Freemen* was not a participant because, "[n]o contributions were made into the defendant-plan on his behalf. Nothing Freemen can do will make him eligible for benefits since he is no longer employed by the defendant." *Id.* at 655. After this holding the Ninth Circuit went on to address the fact that Freeman's claim arose prior to ERISA's enactment.

In *Weiss v. Sheetmetal Worker's Local Number 544 Pension Trust*, 719 F.2d 302 (9th Cir. 1983) the Ninth Circuit specifically rejected the Fifth Circuit's decision in *Nugent v. Jesuite High School*, 625 F.2d 1285 (5th Cir. 1980). The Ninth Circuit left open the "question whether a former employee may qualify as a 'participant' by making a showing that he 'may become eligible' because there is a significant probability he may . . . satisfy vesting requirements in the future." *Id.* at 304. The Ninth Circuit made a decision, limited to the *Weiss* case, that *Weiss* was not a "participant" "because he is a former employee who has made no credible showing that he is vested and because he does not claim that he will return to work." *Id.* Obviously, the Ninth Circuit's decision does nothing for a case like that *sub judice* which involves certain members of the Petitioners' class receiving additional benefits while others do not.

The Ninth Circuit recently rendered another decision which amounts to another single-case analysis. In *Chase v. Trustees of the Western Conference of Teamsters Pension Trust Fund,* 753 F.2d 744 (9th Cir. 1985), without conclusively addressing standing, the Ninth Circuit found that the

> contributions which the [appellants] seek to recover in this case were . . . made while they were thought to be 'participants.' This suit is one for equitable relief to redress what is now seen to have been a violation of the plan.

Id. at 748.

Further conflict in the law on standing under ERISA is created by decisions from the Second and Third Circuits. In *Saladino v. I.L.G.W.U. National Retirement Fund,* 754 F. 2d 473 (2nd Cir. 1985) the Second Circuit decided that "participant is limited to either employees in, or reasonably expected to be in, currently covered employment or *former employees with a colorable claim to vested benefits.*" *Id.* at 476. (Emphasis added.)

In *Buczynski v. General Motors Corp.,* 616 F.2d 1238 (3rd Cir. 1980), a class action was brought by retirees, former employees, who were receiving monthly benefits. Standing as to the appellants was assumed since the appellants were still receiving benefits. The Third Circuit did not address the fact that the value of lump-sum retirement and monthly retirement is to be actuarially alike.

In *Barrowclough v. Kidder, Peabody and Co., Inc.,* 752 F.2d 923 (3rd Cir. 1985) the Third Circuit found, with-

out a specific ruling, that a former employee with non-vested benefits had standing under ERISA to demand an accounting: "If the right to an accounting were dependent on the ultimate outcome of any dispute . . . the statutory provision regarding an accounting would be rendered nugatory." *Id.* at 933.

Indeed, the conflict between and within the circuits has left district courts essentially helpless in maintaining consistency within a circuit. *Stewart v. National Shopmen Pension Fund, et al,* 563 F.Supp. 773 (D.D.C. 1983) (Former employees receiving monthly retirement benefits are participants); *Folz v. Marriot Corp.,* 594 F. Supp. 1007 (W.D.Mo. 1984) (Former employee who was a participant at the time of his termination possesses standing under ERISA to "recover benefits due him . . . , to enforce his rights . . . , or to clarify his rights to future benefits . . . ." *Id.* at 1013); *Yancy v. American Petrofina, Inc.,* 597 F. Supp. 491 (E.D.Tex. 1984) (Former employee who accepted a lump-sum retirement benefit lacked standing under ERISA for breach of duty arising while he was an employee).

As can be seen from the appellate court and trial court decisions cited, there is no continuity in the methods used to determine standing under ERISA. There is conflict between and within the circuits. The issue is one of great importance to the uniform enforcement of ERISA and should be settled by this Court.

II.

Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?

An issue which has been cycloned into the first issue presented to this Court is whether or not the Respondents should have been compelled to arbitrate, not withstanding the "participant" question, when they had agreed to arbitrate. The lower courts, in determining that the Petitioners are not "participants" for standing under ERISA, determined that the Petitioners are not entitled to compel arbitration. The question really becomes whether it is the province of the district court to determine the jurisdiction of an arbitrator or if such determination should be left to the arbitrator. This Court has addressed this issue numerous times. The decision of the Fifth Circuit and of the United States District Court for the Eastern District of Louisiana are in conflict with prior decisions of this Court.

As evidenced by the letters contained in Appendix G, from the outset of the controversy the Respondents agreed to arbitrate the Petitioners' claim; whether the Petitioners were "participants" under the Pension Plan was never raised by the Respondents. Then, without expressed reason, the Respondents withdrew the commitment to arbitrate.

It is well settled that the merits of an arbitration grievance must be left to the arbitrator and not to the federal courts:

> The Court must compel Arbitration with the party seeking same and making a claim which on its face is governed by the contract, even though the court might feel that the grievance is frivolous or baseless.

Ekouri, *How Arbitration Works* 3rd ed., at 29-30 (1976).

In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), in an opinion written by Justice Douglas and announced by Justice Brennen, this Court held that

> [t]he Judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the the present case violated the agreement is the question. *It is a question for the arbiter, not for the courts.*

Id. at 585. (Emphasis added.)

In a decision handed down the same day as *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, this Court found that the "federal policy of settling major disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). This Court stated further that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.*

Finally, in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) this Court removed all doubt concerning the role of federal courts in arbitrable causes:

> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.
>
> . . . .
>
> When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entitled to the arbitration tribunal.

Id. at 568-569.

When the trial court dismissed the Petitioners complaint, and when the Fifth Circuit affirmed, the courts essentially determined the merits of a claim which the Petitioners were ready, willing and entitled to arbitrate. This decision of the lower courts is in direct conflict with prior decisions of this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Dated the 19 day of September, 1985.

Respectfully submitted,

/s/ JAYNE L. BUTTROSS
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ATTORNEYS FOR THE PETITIONERS

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-2553

MELBOURNE E. JOSEPH, SR., ET AL

VERSUS

THE NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL
SECTION "K" (5)

JUDGEMENT

(Filed February 13, 1984)

The Court having previously granted the defendants', The New Orleans Electrical Pension and Retirement Plan, Anthony R. Ziegler, Bernard C. Frischhertz, Jr., Robert L. Appel, A. Bostick, Bernard Raynal and Richard E. Schrieffer, Sr., motion to dismiss;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, The New Orleans Electrical Pension and Retirement Plan, Anthony R. Ziegler, Bernard C. Frischhertz, Jr., Robert L. Appel, A. Bostick, Bernard Raynal and Richard E. Schrieffer, Sr., and against plaintiffs, Melbourne E. Joseph, Sr., Francis Fenasci, D. Adorno, III, James William Ayres, Maurice Paul Bellanger, Wilmer Ben Benison, Lester Joseph Boudreaux, Santo F. Culotta, C. Curry, Bernard E. Cyrus, Bennie Joseph D'Arcangelo, S. D'Arcangelo, Anthony DiPascal, James C. Dyer, Edward Emile Fenasci, F. X. Fenasci, Floyd Michael Johnson, M. E. Joseph, Sr., Louis George Kahl, Edward Lacoste, Rene

Lacoste, August Joseph Lucas, Joseph C. Miller, Jr., Ursin Frank Monier, Joseph Muller, Clyde A. Munch, Victor James Munch, Sr., Frank J. Nicosia, Andrew Bryan Norton, Jacob Earl Plick, Walter F. Ramirez, Jules Lou Schaff, Ferdinand John Schwab, Joseph George Schwartz, Warren L. Seher, Joseph Charles Skinner, William J. Stowell, Alfren Tschirn, Emile J. Wolf, Charles Loyola Wolsch, Charles Zerinque, Jr., L. H. Zirkenback, W. Cain, Eugene James Des Roches, dismissing said plaintiffs' complaint.

New Orleans, Louisiana, this 1st day of February, 1984.

/s/ William Arceneaux
UNITED STATES DISTRICT
JUDGE

APPENDIX "B"

Oral Conclusions Of Law, United States District Court, The Eastern District Of Louisiana, February 1, 1984

* * *

(p. 21) "I'm going to grant the motion to dismiss. I think the statute clearly is not designed to cover prior lump-sum beneficiaries, persons who have opted for a lump-sum distribution, particularly when I'm looking at a plaintiff, a lead plaintiff who goes back to 1977, almost five years before the effective date of the amendment, and in excess of four years prior to the retroactive date of the amendment. The best that you can come up with is someone who lump-summed out in the late summer, August or thereabouts, of 1980, (p. 22) which is some five or six months prior to the retroactive date, and almost a year prior to the amendment to the effective date. The Court also notes that the record clearly reflects that the amendment was predicated upon an effective May 1, 1981 increase in contributions by the participating employers to the plan.

"Now, it may be that the 1981 retroactivity feature was improper, but that by itself would not create standing on these persons who are joined as parties plaintiff to this suit. I think that that's precisely the kind of circumstance that the Fifth Circuit had in mind in Nugent. Now, I have read the Ninth Circuit case, the bricklayers and brickmasons case but I think there what you had is an entirely different situation, the Court sitting in effect as a Court in equity, and here was a breakaway group who elected to opt out of one pension plan and form their own. They remained employees in the pension plan from which they withdrew or — when I say withdrew, their new fund, or their new plan withdrew — had accumulated monies, a surplus that was generated by contributions previously made on behalf of those employees. And those employees, it was

noted by the Court, did not withdraw. There was simply a new organism formed, and they found that that new organism was entitled to the reserve fund which had been generated by virtue of contributions previously made on behalf of these employees.

(p. 23) "We haven't got that situation here. The Fifth Circuit says, We believe that the "may become eligible" language was intended only to apply to current employees. And insofar as receiving benefits are concerned, these employees were not vested at the time that they received their lump-sum distribution, but they have lump-summed out, they have cashed out. They have elected to take their lump-sum distribution in lieu of remaining in under a defined benefit plan, receiving periodic pension payments.

Now, if they were still receiving pension payments, there is no doubt that they would be, in my opinion, a participant, but they are not. They made the election to cash out at the time they respectively made these elections, and if we're going to permit former employees who cash out to come in some almost five years later to contest the efficacy of what was done by administrators of a plan, and trustees of a trust, then you just might as well write out the entire standing issue from ERISA, and substitute in its place some variety of statute of limitations. Congress has not seen fit to do that. So this Court feels that these plaintiffs, none of them, but particularly the lead plaintiff, Mr. Joseph, do not fit the mold, or fit the statutory concept of participants, and, therefore, they have no standing. The motion to dismiss will be granted."

APPENDIX "C"

Melbourne E. JOSEPH, Sr., et al.,

Plaintiffs-appellants,

v.

The NEW ORLEANS ELECTRICAL PENSION & RETIREMENT PLAN, Individually and Its Trustees, et al., Defendants-appellees.

No. 84-3170.

United States Court of Appeals, Fifth Circuit.

March 8, 1985.

Rehearing and Rehearing En Banc Denied April 22, 1985.

Retirees sought to invoke Employee Retirement Income Security Act to obtain federal jurisdiction over their claim that trustees of retirement plan breached duties owed to them under Act. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., dismissed complaint, and appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that retirees who had chosen to receive lump-sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller total sum were not "participants" within meaning of ERISA, and thus they lacked standing to assert that claim.

Affirmed.

1. Master and Servant—78.1(8)

Under Employee Retirement Income Security Act, a "participant," for standing purposes, is any employee

or former employee or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001 et seq., 1002(7).

See publication Words and Phrases for other judicial constructions and definitions.

2. Master and Servant —78.1(8)

To be a "participant," for standing purposes under Employee Retirement Income Security Act, a person must have either a present or a future right to benefits under pension or retirement plan, thereby excluding retirees who have accepted payment of everything due them in a lump-sum, because those erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001 et seq., 1002(7).

3. Master and Servant —78.1(8)

Retirees who had chosen to receive lump-sum retirement benefit in lieu of a continuing monthly benefit that might have yielded a smaller total sum were not "participants" within meaning of the Employee Retirement Income Security Act, and thus they lacked standing to assert claim that trustees of retirement plan breached duties owed to them under Act. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001, et seq., 1002(7).

4. Statutes —219(1)

Interpretation of a statute by agency charged with its administration is entitled to substantial deference.

Melbourne E. Joseph, Jr., Gulfport, Miss., Diana T. Berman, Arabi, La., James K. Wetzel, Jayne L. Buttross, Gulfport, Miss., for plaintiffs-appellants.

Hess & Washofsky, Dennis M. Angelico, New Orleans, La., Carolyn P. Perry, Baton Rouge, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, RUBIN and HILL, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Retired members of the New Orleans Electrical Pension and Retirement Plan invoke the Employee Retirement Income Security Act to obtain federal jurisdiction over their claim that the Trustees of the Plan breached duties owed to them under the Act. Because the district court correctly dismissed the complaint on the ground that plaintiffs, after retirement, were not "participants" within the meaning of the Act, and, therefore, lacked standing to assert their claims, we affirm.

At various times prior to January 1, 1981, each of the plaintiffs reached retirement age and each chose to receive a lump-sum retirement benefit in lieu of a continuing monthly benefit that might have yielded a smaller total sum. The decision to accept the lump-sum retirement bene-

fit was based on the amount of benefits provided retirees by the Plan as it then read.

The Trustees later, in July, 1981, amended the Plan, and voted large increases in the value of a participant's past service credit. The amendment provided that, instead of receiving $1.00 per month for each year of past service credit, a retiree would receive $8.00 per month for each year of past service credit. The complaint alleges, "the above increases were made possible because of an additional .10¢ (sic) per hour on May 1, 1981, as well as an increase in income from investments, in accord with the policy and minutes of the" Plan.

Although the amendment was adopted in July, the Trustees decided to allow certain lump-sum retirees to take advantage of the eight-fold increase in benefits, so they made the amendment retroactive to January 1, 1981. The amendment was thus made applicable to lump-sum retirees who had retired seven months before the increase in benefits, but not to persons who had retired more than seven months before the increase in benefits even if their retirement occurred only one day earlier.

[1] Under ERISA, a "participant," for standing purposes, is "any employee or former employee . . . or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ."[1] The retirees argue that they are clearly "former employees"—as indeed they are—and that they are or "may become eligible to receive a benefit" from the defendant Pension and Retirement Plan.

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1. 29 U.S.C. § 1002(7).

[2-4] We cannot adopt the construction of the Act sought by the pre-1981 retirees. To be a "participant," a person must have either a present or a future right to benefits under the pension or retirement plan. This excludes retirees who have accepted the payment of everything due them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Such retirees have no present or future right to Plan funds, and the Plan no longer has any obligations to these individuals. This is consistent with prior Fifth Circuit decisions limiting the "may-become-eligible" phrase to current employees, and to former employees with currently vested benefits,[2] as well as with Department of Labor regulations pertaining to the administration of ERISA.[3] Those regulations specifically exclude from the definition of "participant" "an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan."[4] The interpretation of a statute by the agency charged with its administration is entitled to substantial deference.[5]

It might be argued that, in voting to increase the benefits for past participants, the Trustees violated their duty

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2. *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228-29 (5th Cir.1981); *Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir.1980).

3. 29 C.F.R. § 2610.2 (1984).

4. *Id.* paragraph (b).

5. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, — U.S. —, — - —, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694, 703-04 (1984); *see United States Department of Justice v. Federal Labor Relations Authority*, 727 F.2d 481, 486 (5th Cir.1984).

to those persons who were continuing participants, by diverting funds that should have been used only for the benefit of participants as defined by the Act. We express no opinion on that question. Nor do we speak to whether lump-sum retirees might state a claim for relief under ERISA on either the contractual basis that a plan prohibits unequal retroactive distribution of benefits or the statutory basis that trustees are not to discriminate within classes of participants or beneficiaries. It was also suggested at oral argument that the Trustees might have accumulated funds before January, 1981 to such an extent that they should have increased benefits before the plaintiffs retired. Although perhaps intimated in the complaint, that issue was not raised in the district court and was not raised in the brief on appeal. We, therefore, do not address it.[6]

For these reasons, the judgment of dismissal is AFFIRMED.

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6. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 fn. 7 (5th Cir.1984); *see First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968).

APPENDIX "D"

FOR THE FIFTH CIRCUIT

No. 84 3170

MELBOURNE E. JOSEPH, SR., ET AL.,

Plaintiffs-Appellants,

versus

THE NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, individually and its trustees, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 8, 5 Cir., 1985, — F.2d —)

(April 22, 1985)

Before GOLDBERG, RUBIN and HILL, Circuit Judges.
PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor

of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

Clerk's Note: See Frap and Local Rules 41 for Stay of the Mandate.

REHG-6

APPENDIX "E"

29 USC § 1002 LABOR

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is, or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

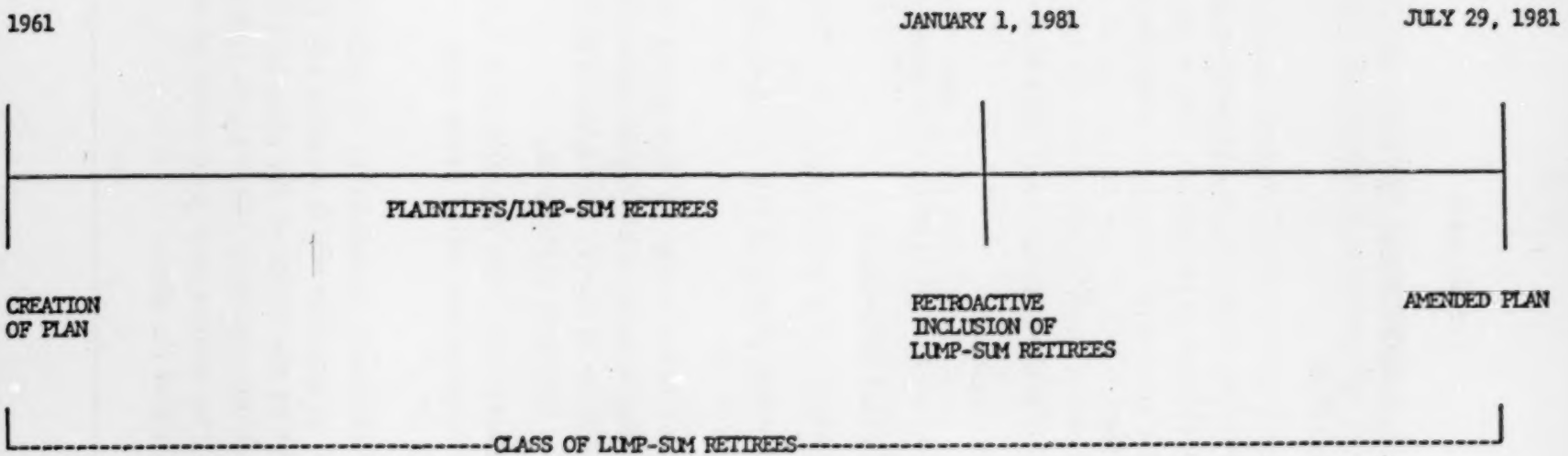
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

APPENDIX "F"

Exhibit "A"



APPENDIX "G"

HESS & WASHOFSKY
A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
Keith R. Credo

Telephone
(504) 949-2742

December 15, 1981

Mr. Melbourne E. Joseph, Jr.
Joseph & Smith, P.A.
Attorneys at Law
P. O. Box 1262
627 Hardy Avenue, Suite C
Gulfport, Mississippi 39501

RE: Pension Benefits
Our File: 1319

Dear Mel:

We are in receipt of your letter of December 4, 1981 with regard to your father's claim for additional retirement benefits. I will present the letter to the trustees and advise with them. Thereafter, I will be back in touch with you.

Sincerely,
/s/ Dennis
Dennis M. Angelico

DMA/cll

HESS & WASHOFSKY
A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
Keith R. Credo

Telephone
(504) 949-2742

April 8, 1982

Mr. Melbourne E. Joseph, Jr.
Joseph & Smith, P.A.
Attorneys at Law
P. O. Box 1262
627 Hardy Avenue
Suite C
Gulfport, Mississippi 39501

RE: Claim of Melbourne E. Joseph, Sr.
for increased pension benefits

Dear Mel:

I have reviewed the matters set forth in your letters of December 4, 1981 and February 9, 1982. In those letters, you set forth the claim of your father, Melbourne E. Joseph, Sr., for increased pension benefits and for the Trust Fund to provide certain information.

It is my understanding that your father retired and elected the optional lump sum form of benefit payments. His retirement was long prior to the Board of Trustees' action in mid-1981 wherein there were certain pension and retirement benefit improvements. The level of improvements in the benefit rates was made based upon advice from the Plan actuary. The increased benefit rate became effective January 1, 1982, and it applied to those indi-

viduals who were retired but did not take the optional lump sum form of benefit payments, i.e., to those who were receiving a monthly pension benefit. The increased benefit levels did not apply to those individuals who retired prior to January 1, 1981 and who opted for the lump sum payment.

As I understand your father's claim, he believes that he should have his lump sum benefit recalculated to reflect the increased benefit rates. In connection with his claim, he has requested that the Board of Trustees furnish him with the names of Plan participants who opted for lump sum benefits when those individuals retired.

I have reviewed the claim of your father, Melbourne E. Joseph, Sr., and I have researched the matter thoroughly. I am of the opinion that the action which the Board of Trustees took in the mid-part of 1981 with regard to increasing benefit levels, and without affording those increases to all individuals who retired prior to January 1, 1982 and who opted for the lump sum benefits, was not only legal, but was based upon actuarial advice in order that the Plan remain actuarilly sound. It is my opinion that the Trustees of Plans such as the New Orleans Electrical Pension and Retirement Plan, have no duty to increase benefits of pensioners after they have retired. Courts consistently recognize that a pensioner's rights vest at the time of retirement and that these rights constitute the full measure of any member's entitlement.

The Trustees of the New Orleans Electrical Pension Plan have full authority to determine all questions of the nature, amount of and duration of benefits to be provided based upon what it is estimated the Trust Fund can pro-

vide without undue depletion or excessive accumulation. The Board of Trustees has done exactly that in this instance. We submit that there is nothing about the action of the Trustees which is unjustified, illegal, arbitrary, capricious or discriminatory. If your father, Melbourne E. Joseph, Sr., is still of the opinion that the action of the Trustees was incorrect in any manner, then he has a right to appear before the Board of Trustees, along with a legal representative, to present his claim. If your father is desirous of doing so, the Trustees and I would appreciate any legal authorities of which you may be aware to support your father's claim.

Very truly yours,
/s/ Dennis M. Angelico

DMA/c11
cc: Board of Trustees,
New Orleans Electrical Pension
and Retirement Plan

Mrs. Louise Brown

HESS & WASHOFSKY

A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico

Keith R. Credo

Telephone
(504) 949-2472

August 5, 1982

Mr. Melbourne E. Joseph, Jr.
627 Hardy Ave., Suite C
P. O. Box 1262
Gulfport, MS 39501

RE: New Orleans Electrical Pension
and Retirement Plan
Our File No. 1319

Dear Mel:

First, let me apologize for not responding to your letter of June 10, 1982. However, my schedule has been extremely hectic this summer.

In your letter of June 10, you requested:

1) A copy of the names of the lump-sum retirees,

2) A copy of the Plan as presently implemented, and

3) The Appeals Procedure.

You indicated this information was requested pursuant to 29-USC, Section 1132.

....

Employee Retirement Income Security Act (ERISA) does require that we furnish you with a copy of the Plan as presently implemented, therefore, we enclose a copy of the Plan herewith which is presently in effect and which was executed on September 14, 1977.

The Appeals Procedure is as follows:

Any participant who is aggrieved by action of the Trustees under this Plan, or who is otherwise adversely affected by any action of the Trustees, shall have the right to request the Board of Trustees to conduct a hearing on the matter, provided that he makes such a request in writing, within sixty (60) days after being appraised of, or learning of, the Board's action. The Board shall then conduct a hearing, at which the participant shall be entitled to present his position and any evidence in support thereof. The participant may be represented at any such hearing by an attorney or by any other representative of his choos-

ing. Thereafter, the Trustees shall issue a written decision reaffirming, modifying or setting aside their former action. If the participant is dissatisfied with the written decision of the Trustees, he shall have the right to appeal the matter to arbitration in accordance with the labor arbitration rules of the American Arbitration Association, provided that he submitted a request for arbitration to the Board of Trustees, in writing within sixty (60) days of receipt of the written decision. The fees of the arbitrator and of the American Arbitration Association shall be borne equally by the appealing party, and by the Trust Fund, and the arbitrator's fee and expenses shall also be borne equally, unless the arbitrator, in his award, should assess such expenses against either of the parties. The decision of the arbitrator shall be final and binding upon the Trustees and upon the appealing party.

Of course, the Board had a hearing at the request of your father, Melbourne E. Joseph, Sr. The Board will issue a written decision sometime in the near future. Should your father not be satisfied with the Board's decision, he has the right to take the matter to final and binding arbitration.

We trust that this will answer your request of June 10, 1982.

Kindest regards,

Sincerely,
/s/ Dennis M. Angelico

HESS & WASHOFSKY
A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
Keith R. Credo

Telephone
(504) 949-2742

November 23, 1982

Mr. Melbourne E. Joseph, Jr.
Joseph, Pritchard, Smith & Associates
Attorneys at Law
384 Courthouse Road
P. O. Box 1262
Gulfport, MS 39501

RE: Joseph, et al vs New Orleans
Electrical Pension and Retirement

Dear Mel:

By letters dated December 4, 1981 and February 9, 1982, you made claim against the New Orleans Electrical Pension and Retirement Plan on behalf of your father and client, Melbourne E. Joseph, Sr. The claim was for increased pension benefits. You also requested the Plan to provide you with certain information. On April 8, 1982, I responded to your letters of December 4, 1981 and February 9, 1982 and set forth our opinion that your father was not entitled to any increases in benefits. In our letter of April 8, 1982, we indicated that if your father still felt that the action of the Board of Trustees in not increasing his benefits was incorrect, then he had the right to appear before the Board of Trustees, along with a legal representative, to present his claim. You subsequently indicated that that was the desire of your father.

On June 9, 1982, you and your father appeared before the Board of Trustees and were allowed to present any evidence or materials and argument with regard to your father's claim that he was due an increase in benefits. The Board took the matter under advisement. Subsequent to the hearing, by letter dated July 10, 1982, you requested certain information. We responded to your request on August 5, 1982.

The Board of Trustees has asked me to issue a written decision on your father's claim.

After having reviewed the claim of your father, and based upon advice from me, the Board of Trustees must once again deny your father's claim for increased benefits.

In Mid-1981, the Board of Trustees for the Pension Plan made certain pension and retirement benefit improvements. The increased levels did not apply to any individual who retired prior to January 1, 1981 and who had, at the time of his retirement, opted for the lump sum benefit. Those individuals who did retire prior to January 1, 1981 but who took the monthly benefit under the provisions of the Pension Plan, did receive an increase in their monthly benefit payment. As stated above, the Board of Trustees made these benefit improvements based upon advice from the Plan actuary and consultant.

As the Board understands your father's claim, he believes that he should have his lump sum recalculated to reflect the increased benefit. The Board of Trustees is of the opinion that the action which it took in the mid-part of 1981 with regard to increasing benefit levels and without affording those benefits to all individuals who retired before 1981 and who opted for lump sum benefits was not

only legal, but was based upon actuarial advice in order that the Pension Plan would remain actuarilly sound.

The Trustees of the New Orleans Electrical Pension and Retirement Plan have full authority to determine all questions of the nature, amount of and duration of benefits to be provided based upon what is estimated the Trust Fund can provide without undue depletion or excessive accumulation. The Board of Trustees has done exactly that in this instance. There is nothing about the action of the Trustees which is unjustified, illegal, arbitrary, capricious or discriminatory.

As we previously indicated to you, if your father is dissatisfied with the decision of the Trustees, he has the right to appeal the matter to arbitration in accordance with the Labor Arbitration Rules of the American Arbitration Association provided he submits a request for arbitration to the Board of Trustees in writing within 60 days of the receipt of the written decision.

Kindest regards,

Sincerely,
/s/ Dennis M. Angelico

DMA/c11
encl.